CHAPTER 3

JURISDICTION

CHAPTER 3

JURISDICTION

3.1 PHILOSOPHY AND PURPOSE

Effective January 1, 1998 the Family Division of Circuit Court was assigned the responsibility formerly designated to the Juvenile Court.[1] This development marks an important evolutionary stage for Michigan's courts as they affect children and families. The Michigan juvenile court originally evolved from the same complex interweaving of historical, humanitarian and social science developments that shaped the juvenile courts around the United States.[2] The juvenile court embodies *parens patriae* philosophy that the state should act as benevolent protector and guardian of those citizens, such as children, mentally incompetent persons and others unable to protect or care for themselves.[3] The juvenile court can trace its origin in part to the equity jurisdiction of the Chancery Courts of England.[4]

The first juvenile court appeared in cook county (Chicago) on July 1, 1899. Boston, New York, Rhode Island, and Colorado followed very quickly. By 1925 all states but two had enacted such legislation.[5] In 1938 the federal government passed a juvenile court act.[6]

---

[1] MCL 600.1001 *et. seq.*

[2]. Mack, The Juvenile Court, 23 HARV. L. REV. 104, 109 (1990); S. Davis, RIGHTS OF JUVENILES: THE JUVENILE JUSTICE SYSTEM, sect. 1.1-1.3 (1983); W.T. Downs, 6 MICH PRAC.: JUV. L. & PRAC. sect. 1.1-1.20; sect 2.3 (1983)

[3]. But See, *In re Gault*, 387 U.S. 1,12 (1967) in which Justice Fortas writes "The Latin phrase proved to be a great help to those who sought to rationalize the exclusion of juveniles from the constitutional scheme; but its meaning is murky and its historic credentials are of dubious relevance."

[4]. [A]lthough, in general, parents are intrusted with the custody of the persons, and the education of their children, yet this is done upon the natural presumption, that the children will be properly taken care of, and will be brought up with a due education in literature, and morals, and religion; and that they will be treated with kindness and affection. But, whenever this presumption is removed; whenever (for example) it is found, that a father is guilty of gross ill treatment or cruelty towards his infant children; or that he is in constant habits of drunkenness and blasphemy, or low and gross debauchery; or that he professes atheistical or irreligious principles; or that his domestic associations are such as tend to the corruption and contamination of his children; or that he otherwise acts in a manner injurious to the morals or interests of his children; in every such case, the Court of Chancery will interfere, and deprive him of the custody of his children, and appoint a suitable person to act as guardian, and to take care of them, and to superintend their education. 2 J. STORY COMMENTARIES ON EQUITY JURISPRUDENCE 702 (7th ed. 1857)(footnotes omitted). For a discussion of the history of child neglect laws *see* Thomas, *Child Abuse and Neglect, Part 1: Historical Overview, Legal Matrix and Social Perspectives*, 50 N.C. L. REV. 293 (1972)

[5]. P. TAPPAN, JUVENILE DELINQUENCY, 172 (1949)

[6].s. 4090, 75th Cong., 83 CONG. REC.,8822, June 10, 1938; P. TAPPEN, JUVENILE DELINQUENCY, 172-3 (1949)

The philosophy of the juvenile court has remained fairly consistent since the early days even though the realization of those lofty ideals has often remained elusive.[7] Judge Lindsay, the "Father of the Juvenile Court in Colorado" reflected that philosophy when he said in 1904:

> [The Juvenile Law and Court] has awakened the State to see with clearer vision that the child is not to be reformed but to be formed.... This should be accomplished as a wise and loving parent would accomplish it, not with leniency on the one hand or brutality on the other, but with charity, patience, interest, and what is most important of all, a firmness that commands respect, love, and obedience, and does not produce hate or ill-will. To correct the child we must often begin by correcting the parent, improving the environment in which the child lives, and adding, as far as possible, good opportunities to its life. If the parent is careless and negligent, punishment is rather for the parent than the child. If the parent is helpless or if the environment is such as to seriously hamper the honest effort to the parent,...then the state simply comes to the aid of the parent and the child.[8]

Michigan has followed this tradition in the enactment of a juvenile code in 1907 the constitutionality of which was upheld in 1910.[9] The preamble to our juvenile code passed in 1929 and amended extensively in 1939, 1944 and 1989 reflects the state philosophy best:

> This chapter shall be liberally construed to the end that each child coming within the jurisdiction of the court shall receive the care, guidance and control, preferably in his own home, as will be conducive to the child's welfare and the best interest of the state. If a child is removed from the control of his or her parents, the child shall be placed in care as nearly as possible equivalent to the care, which should have been given to the child by his or her parents.[10]

The statute and judicial interpretations have created a strong presumption in favor of parental custody of children. In *In re Mathers*, the Supreme Court of Michigan said:

> First, we take up the matter of legislative policy. Even without the statutory guidance so manifest here, it is the policy of the law to keep children with their

---

7. *SEE, e.g., In re Gault*, 387 U.S. 1 (1967)

8. A Report of the Juvenile Court of Denver: THE PROBLEM OF THE CHILDREN AND HOW THE STATE OF COLORADO CARES FOR THEM. 30 (1940)

9. Act 6 of the Special Session and Act 323, of 1907; *In re Mould*, 162 Mich 1, (1910); DOWNS, *Supra* note 1 at sect. 1.12

10. MCL 712A.1(2)

> natural parents, where at all possible. The statute merely emphasizes that policy.[11]
>
> The legislature thus, in clear and unmistakable language, has affirmed the ancient policy of law and society of keeping children with their natural parents; further, if a child is temporarily removed from such custody to return it to its family whenever feasible.[12]

It is amazing how consonant these sentiments are with the modern permanency planning movement. Yet parents and custodians seriously abuse children and even kill them. We want to protect children first and foremost by removing the danger whenever possible, and, failing that, by removing the children from the danger. While the intent and purpose of the juvenile court intervention in child protection cases has been a benevolently motivated one -- to help families in trouble, keeping children at home to the extent possible -- we ought not lose sight of the fact that the fundamental personal rights are at stake for both parents and children. Michigan courts[13] and the U.S. Supreme Court[14] have recognized the parent-child relationship and matters of family life as a fundamental liberty interest protected by the United States Constitution and the Michigan Constitution. Benevolent state intentions do not justify any relaxation of legal safeguards or procedural protections for parent or children.[15] Mr. Justice Brandeis warned us about the dangers to our liberty of the benevolently intended state:

> Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding.[16]

3.2. CHILD PROTECTION JURISDICTION OF FAMILY COURT

3.2.1. *Statutory Basis*

---

11. 371 Mich 516 (1963) at 533

12. Id. at 534, See also *Fritts v. Krugh* 354 Mich 97 (1958)

13 *Reist v. Bay Circuit Judge,* 396 Mich 326, 342 (1976), *In re LaFlure,* 48 Mich App 377 (1973), *In re Kurzawa,* 95 Mich App 346, 356 (1980)

14 *Santoskey v. Kramer* 455 U.S. 745 (1982); *Lassiter v. DSS of Durham County* 452 U.S. 18 (1981); *Quilloin v Walcott,* 434 U.S. 246, 255 (1978); *Smith v. Organization of Foster Families*, 431 U.S. 816, 845 (1977); *Moore v. East Cleveland,* 431 U.S. 494, 499 (1977) (plurality opinion); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 639-640 (1974); *Stanley v. Illinois,* 405 U.S. 645, 651-52 (1972); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944)*; Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923)

15 *In re Gault, supra*

16. *Olmstead v. United States,* 277 U.S. 438, 479 (1928) (Mr. Justice Brandeis dissenting)

The Michigan Juvenile Code, MCL 712A.1 *et. seq.*, provides the statutory basis for court jurisdiction over cases of alleged child abuse and neglect. Since the "juvenile court" is a court of limited jurisdiction, its power to act depends on a specific grant of statutory power. This section of the statute establishes the jurisdictional basis of the family division of circuit court over child protection cases.

Sec. 2. The court has the following authority and jurisdiction:
***
(b) Jurisdiction in proceedings concerning a child under 18 years of age found within the county

(1) Whose parents or other person legally responsible for the care and maintenance of the juvenile, when able to do so, neglects or refuses to provide proper or necessary support, medical, surgical, or other care necessary for his or her health or morals, who is subject to a substantial risk of harm to his or her mental well-being, who is abandoned by his or her parents, guardian, or other custodian, or who is otherwise without proper custody or guardianship. As used in this sub-subdivison:

(A) "Education" means learning based on an organized educational program that is appropriate, given the age, intelligence, ability, and psychological limitations of a juvenile, in the subject areas of reading, spelling, mathematics, science, history, civics, writing, and English grammar.
(B)"Without proper custody or guardianship" does not mean a parent has placed the child with another person who is legally responsible for the care and maintenance of the juvenile and who is able to and does provide the child with proper care and maintenance.

(2) Whose home or environment by reason of neglect, cruelty, drunkenness, criminality, or depravity on the part of a parent, guardian, nonparent adult, or other custodian, is an unfit place for such juvenile to live in.[17]

The juvenile code also gives the court a "spill-over" neglect jurisdiction where a court-ordered guardianship has failed.

---

17. MCL 712A.2(b)

(3) Whose parent has substantially failed, without good cause, to comply with a limited guardianship placement plan described in section 5205 of the estates and protected individuals code, 1998 PA 386, MCL 700.5205 regarding the juvenile.

(4) Whose parent has substantially failed, without good cause, to comply with a court structured plan described in section 5207 or 5209 of the estates and protected individuals code, 1998 PA 386, MCL 700.5207 and 700.5209, regarding the juvenile.

(5) If the juvenile has a guardian under the estates and protected individuals code, 1998 PA 386, MCL700.1101 to 700.8102and the juvenile's parents meet both of the following criteria:

(a) The parent, having the ability to support or assist in supporting the juvenile, has failed or neglected, without good cause, to provide regular and substantial support for the juvenile for 2 years or more before the filing of the petition or, if a support order has been entered, has failed to substantially comply with the order for 2 years or more before the filing of the petition.

(b) The parent, having the ability to visit, contact, or communicate with the juvenile, has regularly and substantially failed or neglected, without good cause, to do so for 2 years or more before the filing of the petition.

"Nonparent adult" is defined in MCL 712A.13a(1)(g) as a person, 18 or older, who, regardless of domicile, meets the following criteria:

(i) Has substantial and regular contact with the child.
(ii) Has a close personal relationship with the child's parent or with a person responsible for the child's health or welfare.
(iii) Is not the child's parent or a person otherwise related to the child by blood or affinity to the third degree.

3.2.2 Varying Meaning of the Term "Jurisdiction" in Protection Cases

3.2.2.1 The Term "Jurisdiction" is Ambiguous

Unfortunately, the term "jurisdiction" has several distinct meanings commonly used in Michigan family courts -- to the confusion of many. In addition to the subject matter jurisdiction as established by statute,

the word "jurisdiction" also refers to the age limits[18] and the geographic territory within which the court may exercise its authority.[19] , "Jurisdiction" also refers to the *power* to exercise authority *in loco parentis* which flows from a finding of fact that the child in question belongs to the class of children over which the family court has power to act; i.e. the facts of a given case bring a child within the provisions of section 712A.2(b). For example, MCR 5.973(A) reads: "A dispositional hearing is conducted to determine measures to be taken by the court with respect to the child *properly within its jurisdiction.*... (emphasis added.)

To add further confusion to the use of this single term, the quality of court jurisdiction over a child, i.e. the court's power to exercise authority, varies with the procedural stage of the family court process. There is no consensus as to the exact terms to describe the varying scope or quality of the court's jurisdiction. The following may be a useful way to organize your thinking about the process.

1) *Emergency jurisdiction* is taken when the court issues and *ex parte* order pursuant to MCL 712A.15 and the child is placed out of his or her home without hearing.
2) *Preliminary jurisdiction* is assumed when a child is continued in custody after a preliminary hearing provided for in MCL 712A.13a and MCR 5.965 and before formal adjudication.
3) *Temporary jurisdiction* results after formal adjudication, i.e., after a trial or a plea by respondent(s) and the court finds that the facts alleged are true and bring the child within the provisions of the statute, MCL 712A.2(b).
4) *Permanent jurisdiction* over a child results when the court places the child in the permanent custody of the court pursuant to 712A.19b and terminates all parental rights to the child.

Because the term "jurisdiction" is not used with precision in the Juvenile Code, exercise care to avoid confusion.

3.2.2.2. Geographic Jurisdiction; Found Within the County

The phrase, "found within the county" means physically present in the county and is consistent with the dictionary definition of found which is,

---

[18]. Under 18, MCL 712A.2(b)

[19]. "found within the county" Id.

"a person is said to be found within a state when actually present therein" and is not the same as residence or domicile.[20]

3.2.2.3. Age Jurisdiction

Section 2(b) of the juvenile code provides neglect jurisdiction over children who have not yet reached their eighteenth birthday.[21] Once established, court authority may continue over a child for two years beyond the maximum age of jurisdiction, i.e. age 20.[22] The court may assume jurisdiction of a child if the petition is filed prior to his or her eighteenth birthday but acted upon subsequent to the 18th birthday.[23] Thus, if a neglect petition is filed before a youngster's eighteenth birthday, the family court seems to have the power to exercise its full authority.

3.3 CONCEPT OF LEGAL NEGLECT IS IMPRECISE

3.3.1. *Broad and Vague Standards*

Every state today has a statute allowing a court, typically a family court, to assume jurisdiction over a neglected or abused child and to remove the child from parental custody under broad and vague standards reminiscent of those invoked by courts of equity in the nineteenth century.[24]

Protective services workers, judges and lawyers involved with family court are well aware that the statutory definition of neglect in MCL 712A.2(b) is not very precise. As is the case in many other states, the statutory definition of legal neglect in Michigan does not provide specific guidelines as to what the minimum standard of childcare is in our state. The Court of Appeals has said, "the criteria for determining what constitutes neglect is not clear."[25] Justice Blackmun in his dissent in *Lassiter*[26] noted:

---

20. BLACK'S LAW DICTIONARY 808 (4th Ed.Rev; *In re Mathers*, 371 Mich 516, 526 (1963)

21. MCL 712A.2(b)

22. MCL 712A.2a(1); MCL 712A.5 reads, in part: "The court does not have jurisdiction over a juvenile after he or she attains the age of 18 years, except as provided in section 2a."

23. MCL 712A.2a(5); MCR 5.903((A)(10) reads, "Minor" means a person under the age of 18, and may include a person of age 18 or older concerning whom proceedings are commenced in the juvenile court and over whom the juvenile court has continuing jurisdiction pursuant to MCL 712A.2 ***.

24. Mnookin & Weisberg, CHILD, FAMILY AND STATE 455 (1995)

25. *In re Franzel*, 24 Mich App 375 (1970)

26. *Lassiter v. Department of Social Services*, 452 U.S.18 (1980)

> The legal issues posed by the State's petition are neither simple nor easily defined. The standard is imprecise and open to the subjective values of the judge.[27]
>
> ***
>
> This court more than once has averted to the fact that the "best interests of the child" standard offers little guidance to judges, and may effectively encourage them to rely on their own personal values. See e.g. *Smith v. Organization of Foster Families* 431 U.S. at 835, n. 36 (1977); *Bellotti, v. Baird* 443 U.S. 622, 655 (1979) ...See also *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978)[28]

Constitutional challenges of child neglect laws based on vagueness stem from "the exaction of obedience to a rule or standard which [is] so vague and indefinite as really to be no rule or standard at all.'[29]

State child neglect statutes have been declared unconstitutionally vague in Iowa,[30] Alabama[31], and Arkansas[32]. For example, in *Alsager* the state parental termination statutes were challenged as unconstitutionally vague. Those statutes allowed parental rights to be terminated if the parents have "abandoned the child" or "parents have substantially and continuously or repeatedly refused to give the child necessary parental care and protection" or if the "parents are unfit by reason of debauchery, intoxication, habitual use of narcotic drugs, repeated lewd and lascivious behavior, and other conduct found by the court likely to be detrimental to the physical or mental health or morals of the child.[33]

The court found the juvenile court standards:

> [U]nconstitutionally vague, both on their face and as applied, in that (1) they do not, and did not here give fair warning of what parental conduct is proscribed, (2) they permit, and permitted here, arbitrary and discriminatory terminations, (3) they inhibit, and inhibited here, the exercise of the fundamental right to family integrity. This Court is not indifferent of the difficulties confronting the State of Iowa when attempting to regulate parental conduct vis-a-vis the child. Nevertheless, Due Process requires the state to clearly identify and

---

27. Id. 45

28. Id. 45, n. 13

29. *A.B. Small Co. v. American Sugar Ref. Co*., 267 U.S. 233 239 (1925)

30. *Alsagerv. District Court of Polk County, Iowa (Juvenile Division),* 406 F Supp 10 (S.D. Iowa 1975); aff'd on other grounds 545 F.2d 1137 (CA 8 1967)

31. *Roe v. Conn*, 417 F Supp 769 (M.D Ala. 1976)

32. *Davis v. Smith*, 583 S.W.2d 37 (1979)

33. . Code of Iowa sect. 232.41

> define the evil from which the child needs protection and to specify what parental conduct so contributes to that evil that the state is justified in terminating the parent child relationship.[34]

A majority of appellate courts considering vagueness challenges to child neglect statutes have upheld them, however. In *In re Gentry*, the Michigan Court of Appeals held that both the jurisdiction and the termination statutes are not unconstitutionally vague.[35] The reasoning of the state court decisions upholding child abuse and neglect statutes against vagueness challenges is that child neglect by its very nature is incapable of precise and detailed definition. To narrow the statute would effectively diminish the rights of children who have no other means of protecting themselves. Further, these child neglect laws have existed for over 80 years. Although passage of time is not conclusive as to validity and constitutionality, it creates a strong presumption against invalidity. Similar results have been reached by courts in Oregon,[36] California,[37] South Dakota,[38] North Carolina,[39] and Washington.[40] The U.S. Supreme Court has never found a state child protection statute void for vagueness.

3.3.2. *Value Judgment is Required*

The question of whether or not legal neglect exists is especially difficult because a three-step analysis is required. First, as in any court, the *facts* of the case must be determined. Second, the standards of the applicable law must be consulted. Third, a normative judgment, that is a value judgment, is made by the court as to whether or not the facts as proven violate the *community minimum standard of child care* below which a parent shall not fall lest the state intervene on behalf of the child.

The statutory definition of legal neglect is broad and flexible enough so that the juvenile judge not only determines that the facts fit the statutory definition but also that the community minimum standard of childcare is breached in a particular case. Only then does legal neglect exist. For example, facts are alleged: "Brown left her nine-year old child alone for ten hours." The facts are proven true or not true. The statute allows the family court to assume jurisdiction of a child "who is abandoned...." Does leaving a nine-year old child

---

34. *Alsager*, at 21

35 *In re Gentry* 142 Mich App 701 (1985)

36. *State v. McMaster*, 259 Or. 291, 486 P.2d 567 (1971)

37. *In re J.T.* 115 Cal Rptr 553 (1974)

38. *In the Matter of K.B., T.B. and S.B.*, 302 N.W. 2d 410 (1981)

39. *In re Huber,* 291 S.E.2d 916 (1982)

40. *In re Aschauer's Welfare,* 611 P.2d 1245 (1980)

alone for ten hours under these circumstances constitute child neglect? Does such an act breach the norms of this community, i.e., the community minimum standard of childcare?

Because interpretation of the facts and the law in child neglect depends so much on value judgments that are somewhat personal and idiosyncratic, the community minimum standard of childcare varies from county to county and even from judge to judge or referee to referee within the same county. One only has to consider the standards of childcare in our parents' and grandparents' generations to realize their evolving and flexible nature.

Although the statutory standards of child neglect are ambiguous, appellate decisions have clarified them over the years. The discussion, which follows, is a partial and not exhaustive enumeration of the legal grounds for temporary wardship in Michigan. This is an attempt to identify the principal *Michigan* cases which speak to the question of minimum statutory standards for child neglect jurisdiction.

3.4 MICHIGAN CASE LAW: STANDARDS FOR TEMPORARY CHILD NEGLECT JURISDICTION UNDER 712A.2(b)

3.4.1 *Proof of Neglect is Necessary; Parents not Held to Ideal Standard*

Parents will not be held to any ideal standard in the care of their children, said the Michigan Supreme Court in *Fritts v. Krugh*, but rather to minimum statutory standards. Their fitness as parents and the questions of neglect of their children must be measured by statutory standards without reference to any particular alternative home which may be offered the children.[41]

Evidence which would support a finding of temporary wardship need only establish temporary neglect while "the entry of an order for permanent custody due to neglect must be based upon testimony of such a nature as to establish or seriously threaten neglect of the child for the long-run future."[42]

There must be some testimony of neglect before the court has the power to take jurisdiction of a child.[43] Consent of the parties is insufficient to confer jurisdiction on the court. The court must still independently determine whether a

---

41. *Fritts. v. Krugh*, 354 Mich 97 (1958), 115

42. Id., 114

43. *In re Hatcher*, 443 Mich 426 *(1993); In re Kurzawa* 95 Mich App 346 (1986)

sufficient factual basis exists to permit the court to assume jurisdiction.[44] The best interests of the child, although relevant in child protection proceedings is not by itself a basis for the court to take jurisdiction.[45] There must be a statutory basis under MCL 712A.2(b).

Culpable neglect need not be shown to support exercise of jurisdiction by the family court over a child. The respondents need not be blameworthy in order for the court to find the children neglected under MCL 712A.2(b)(2) and assume jurisdiction.[46]

3.4.2 *Criminality; Adverse Effect on the Child*

Michigan cases have held that the status of a parent itself, without a showing that the parental status adversely affects the children is an insufficient grounds for jurisdiction. Some showing of an adverse affect on the children flowing from the parental status is required. *People v. Brown*[47] involved a petition brought under the "criminality" section of 712A.2(b)(1) alleging that the home in which the minor children were living was unfit because the mothers were living in a homosexual relationship. The Court of Appeals said:

> There was sufficient evidence to support the conclusion that the women were engaged in a lesbian relationship. However, there is very little to support the conclusion that this relationship rendered the home an unfit place for the children to reside.[48]

The case was remanded for a full hearing to determine if the home was unfit.

Similarly in *Curry*[49] both parents were incarcerated for criminal acts and the children had been placed with relatives. Besides finding that the court may not take jurisdiction based on "improper custody and guardianship" absent a showing of unfitness of the relatives with whom the children were placed by the parents the court held:

> In the sum we are persuaded that the criminal status alone of these respondents is not a sufficient basis for the probate court's assumption of jurisdiction. Some showing of unfitness of the custodial environment

---

44. *In re Brock*, 442 Mich 101 (1993); *In re Hatcher*, 443 Mich 426 (1993); *In re Youmans* 156 Mich App 679 (1986)

45. *In re Schejbal*, 131 Mich App 833 (1984)

46. *In re Jacobs*, 433 Mich 24 (1989); *In re Middleton*, 198 Mich App 197 (1993).

47. *People v. Brown*, 49 Mich App 358 (1973)

48. Id. at 365

49. *In re Curry*, 113 Mich App 821 (1982)

> was necessary and no such showing was made in the instant case. The state should not inject itself into the lives of its citizens except when specifically authorized by law and when necessary to prevent abuse and neglect.[50],[51]

Evidence of violence between the parents was relevant to show that the home was an unfit place for the children by reason of criminality or depravity.[52]

3.4.3 *Unfit Home Environment*

Evidence of acts of physical and sexual abuse upon a three year old by the mother's boyfriend was sufficient to support a finding that the mother's home was an unfit place for the child to live and make the child a temporary ward of the court.[53] Allegations of a dirty home, diaper rash, and that one child had swallowed valium were insufficient to grant the court jurisdiction over the children where there were no allegations that the home was uninhabitable.[54]

3.4.4. *Proper Custody and Guardianship; Relative Placements*

The phrase "without proper custody and guardianship" has been clarified by the legislature so that the phrase:

> does not include the situation where a parent has placed the child with another person who is legally responsible for the care and maintenance of the child and who is able to and does provide the child with proper care and maintenance.[55]

"Without proper custody and guardianship has also been interpreted by several Michigan courts. Parents are free, without state interference, to place their children in a custodial environment of their choosing as long as it is fit.[56] In *Curry* the court held:

> Until there is a demonstration that the person entrusted with the care of the child by the child's parent is either unwilling or incapable of

---

[50] Id. 830

[51]. For a case in which no showing of harm to the child was required compare *In re Snyder*, 328 Mich 277 (1950)

[52]. *In the Matter of Miller*, 182 Mich App 70 (1990)

[53]. *In the Matter of Brimer*, 191 Mich App (1991)

[54]. *In re Youmans*, 156 Mich App 679 (1986)

[55]. MCL 712A.2(b)(1)(B)

[56]. *In re Ward*, 104 Mich App 354 (1981)

> providing for the health, maintenance and well being of the child, the state would be unwilling to interfere.[57]

In *Systema,* where the mother who had been the sole custodial parent was dead, the non custodial father was in prison, and no legal guardian had been appointed for the children before the mother's death, even though the mother had allowed the children to live with her brother temporarily before she entered the hospital, the children were without "proper custody and guardianship" for purposes of the court assuming jurisdiction as the first step to termination of father's parental rights.[58] In *Hurlbut*, the child was also without proper custody and guardianship and subject to the jurisdiction of the juvenile court. In *Hurlbut*, the respondent father, serving a life sentence for first degree murder, argued that the child was not without proper care and guardianship because the deceased mother named guardians for the child in her will. The court disagreed, holding that no guardianship was properly established since the father, survived her, thus rendering her testamentary appointment ineffective.[59]

Where parents placed a child in a relative's home, that act by itself is not evidence of neglect or abandonment but shows concern for the child so long as the relative provides adequate care.[60]

3.4.5 *Emotional Neglect*

The statutory language requires a *substantial risk of harm* to the child's mental well-being rather than requiring an actual *deprivation of emotional well-being* as provided in the pre 1988 language. The current language seems intended to reach more cases than the old language.[61]

Where a father attempted to kill a child and commit suicide and was serving a prison term for second-degree child abuse, the Court of Appeals found that the lower court erred by failing to take jurisdiction on the basis of risk of harm to the child's mental well-being. The court reasoned that the parent's imprisonment does not eliminate the emotional impact on the child of the previous events.[62]

---

57. *In re Curry,* 113 Mich App 821 (1982); accord *In re Ward*, 104 Mich App 354 (1981); See also *In re Taurus F*., 415 Mich 512 (1982) (Decided by an equally divided Supreme Court, 3-3)

58. *In re Systma*, 197 Mich App 453 (1992)

59. *In re Hurlbut*, 154 Mich App 417 (1986)

60. *In re Nelson*, 190 Mich App 417 (1991)

61. MCL 712A.2(b)(1)

62 *In re SR*, 229 Mich App 310 (1998)

Appellate courts have found jurisdiction proper when based on "deprivation of emotional well-being" where a mother failed to visit the children frequently and the father said he had no objections to the court taking jurisdiction on the grounds of "so-called neglect".[63] Testimony of a social worker that the mother failed to provide proper food, clothing and instructions for care of the child and failure to respond to the child's emotional needs was sufficient to sustain termination of parental rights.[64]

Even though the statutory language has changed, the court of appeals holding in *Kurzawa* is relevant here. The court held that the statutory phrase "deprived of emotional well-being" must be interpreted consistently with the other statutory bases of jurisdiction and with the constitutional rights of a parent to the custody of his or her child.[65] In *Kurzawa*, the parents were alleged to be unable to control their child's behavior. There were no allegations of physical neglect or deprivation nor that the parents did not love their child or were not devoted parents. The petition alleged an inability on the part of the Kurzawas to discipline their child. The court of appeals found there was insufficient evidence that the parents were so neglectful of the child's emotional welfare as to permit state interference with their fundamental right to raise their child. A substantial deprivation of a constitutionally protected right cannot be wrought by imparting over generalized meaning to vague statutory language. Thus the phrase, "deprived of emotional well-being" cannot be employed as a catchall jurisdictional grant. The phrase must be considered in its context to require proof of seriously neglectful parents.[66]

In *Middleton*, the court found that the mother's status, as a developmentally disabled adult under plenary guardianship, gave rise to a presumption that her newborn daughter was at substantial risk of harm and was without proper custody and guardianship, thus permitting the court to exercise jurisdiction.[67]

3.4.6. *Prenatal Neglect*

Prenatal treatment can also be evidence of a child's neglect.[68]

> Since prior treatment of one child can support neglect allegations regarding another child, we believe that prenatal treatment can be

---

63. *In re Arntz*, 125 Mich App 634 (revs'd on other grounds, 418 Mich 941) (1983)
64. *Matter of Boughan*, 127 Mich App 357 (1983)
65. *In re Kurzawa*, 95 Mich App 346, 356 (1980)
66. Id.
67. *In re Middleton*, 198 Mich App 197 (1993)
68. *In re Baby X*, 97 Mich App 111 (1980)

> considered probative of a child's neglect as well. We hold that a newborn suffering narcotics withdrawal symptoms as a consequence of a prenatal maternal drug addiction may properly be considered a neglected child within the jurisdiction of the probate court.[69]

3.4.7. *Family Court Jurisdiction Over the Unborn Child*

Does the family court have jurisdiction over unborn children? In *Dittrick* the Bay County juvenile court assumed jurisdiction over an unborn child whose siblings had been placed in the permanent custody of the court following continuous physical and sexual abuse by the parents. Criminal charges against both parents were pending at the time of the court of appeals review. Based on the neglect and abuse of the previous child the court assumed jurisdiction under MCL 712A.2(b)(2) which speaks of the child's home or environment being unfit by reason of neglect, drunkenness, criminality or depravity. The court of appeals declared that "the Legislature did not intend application of these provisions to unborn children."[70]

Dittrick, however did not present a situation where the life of the fetus itself was in danger. *Dittrick* rested on section 2(b)(2) of the juvenile code which addresses the home environment of the child. Several cases at the trial level in Michigan and in other states have addressed the situation where the fetus itself was neglected and in danger. *In re Baby X* addressed the question of the legal rights of fetuses:

> While there is no wholesale recognition of fetuses as persons, *Roe v. Wade*, 410 U.S. 113, 162(1973), *Toth v. Goree*, 65 Mich App 296, 303 (1975), fetuses have been accorded rights under certain limited circumstances. *O'Neil v. Morse*, 385 Mich 130 (1971) (wrongful death action allowable for 8-month-old viable fetus) *Womack v. Buchhorn*, 384 Mich 718 (1971) (common law action allowable for surviving child injured during the fourth month of pregnancy), *La Blue v. Specker*, 358 Mich 558 (1960) (dram shop action allowable for fetus of dead father). This limited recognition of a child *en ventre sa mere* as a child *in esse* is appropriate when it is for the child's best interest. *La Blue, supra,* at 563. Since a child has a legal right to begin life with a sound mind and body, *Womack, supra,* at 725, we believe it is within his best interest to examine all prenatal conduct bearing on that right.[71]

---

69. Id. at 116

70. *In re Dittrick Infant*, 80 Mich App 219, 223 (1977)

71. *In re Baby X*, 97 Mich App 111, 115 (1980)

In *Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson*[72], the court ordered a pregnant woman to undergo blood transfusions necessary to preserve her life and that of her unborn child. In *Jefferson v. Griffin Spaulding County Hospital Authority*[73] a pregnant woman diagnosed as having placenta previa was ordered by the court to undergo cesarean section delivery in order to preserve the life of her unborn child. Closer to home, *In the Matter of Unborn Baby Wilson*,[74] the Circuit Court in Calhoun County, Michigan affirmed an order of the juvenile court requiring the mother to take insulin injections to preserve the life and health of the unborn baby over her religious objections. The circuit court said that *Dittrick* was not dispositive and did not apply to the facts of his case. *Dittrick* was distinguished in that there were no allegations of direct abuse or neglect toward the fetus itself and no evidence of danger or threat of harm to the unborn child. There was substantial likelihood of harm facing the Wilson Child, said the court:

> Was the court required by the Dittrick case to ignore this evidence and wait until the child was born, potentially with a birth defect, and then acquire jurisdiction? The appellee submits that the future welfare of the unborn child requires a negative answer to this question. The court agrees.[75]
>
> Nothing in Dittrick prevents the juvenile judge from finding that a viable fetus is a child within the meaning of the juvenile code.[76]

3.4.8. *Ordering Medical Treatment*

The family court is empowered to order medical care for a child falling within the provisions of the Juvenile Code. Section 2(b)(1) gives the court jurisdiction over a child "whose parent or other person legally responsible for the care and maintenance of such child, when able to do so, neglects or refuses to provide proper or necessary *** medical, surgical or other care necessary for his health***"[77]

Unless the court has assumed formal jurisdiction over a child, there appeared to be no authority for the court to enter orders regarding medical treatment until

---

72. *Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson*, 42 N.J. 421, 201 A2d 537 (1964)

73. *Jefferson v. Griffin Spaulding County Hospital Authority*, 247 Ga. 86, 274 S.E.2d 457 (1981)

74. Docket No. 81-108 AV, decided March 9, 1981

75. Id.

76. Id.

77. MCL 712A.2(b)(1

the case of *In re AMB*.[78]. In *AMB*, an infant was born with a life-threatening heart condition and within hours of her birth she was placed on a ventilator. The child was a product of rape. The father of the infant was also the father of the baby's mother, KB. The child's mother was allegedly mentally impaired or developmentally delayed. The FIA filed a petition seeking temporary jurisdiction over the infant and permanent custody of the minor mother. Within a couple days of the petition being authorized, the hospital contacted the FIA because they wanted to remove the child from life support.

The family court held a hearing and authorized the removal of life support. The Michigan Court of Appeals held that "MCL 722.124a(1) enabled the family court to act in this case even before holding an adjudication," because of the unique circumstances but they stressed that "the parties and the family courts in protective proceedings must make *every* possible effort to hold an adjudication before authorizing withdrawal of life support."[79]

A clear grant of authority to order medical care follows, however, if the court assumes formal jurisdiction under section 2(b) and enters a dispositional order under MCL 712A.18(f) which allows the court to enter appropriate orders for health care:

> (f) *Health care***.** Provide the child with medical, dental, surgical or other health care, in a local hospital if available, or elsewhere, maintaining as much as possible a local physician-patient relationship ***.[80]

Emergency trials are often conducted in medical needs cases, even in the hospital where, upon the proper showing, the court may make the child a temporary ward and enter the necessary orders permitting medical care Note, however, that elective, non-emergency medical care surgery must be consented to by parents unless the child is a permanent ward of the court.[81]

A leading example of a medical neglect case is *People ex rel. Wallace v. Labrenz*.[82] In *Wallace*, an 8-day-old infant's life was threatened by a blood disease, and doctors had determined that a blood transfusion was necessary to save the baby's life. The child's parents refused to consent to a blood

---

[78] *In re AMB*,___Mich App___;___NW2d___(2001)

[79] *In re AMB, supra*, slip op, at p, 19

[80]. MCL 712A.18(f)

[81]. MCL 722.124a

[82]. *People ex rel. Wallace v. Labrenz*, 411 Ill. 618, 104 N.E.2d 769 (1952)

transfusion. The parents were Jehovah's Witnesses, and they believed that blood transfusions were forbidden by their religion.

A lower court, after a petition was filed alleging parental neglect, found the infant to be a dependent child, and appointed a guardian for the child. The guardian was authorized by the court to consent to the blood transfusions. The parents challenged these actions of the lower court on constitutional grounds.

The Supreme Court of Illinois noted that the "case [fell] within that highly sensitive area in which governmental action comes into contact with the religious beliefs of individual citizens."[83] The court had little difficulty reaching a decision in the case, however. In the court's opinion, it was well settled that although "freedom of religion and the right of parents to the care and training of their children are to be accorded the highest possible respect...`neither rights of religion or rights of parenthood are beyond limitation."[84] The court quoted further from the *Prince* case: "[t]he right to practice religion freely does not include liberty to expose the community or child to communicable disease or the latter to ill health or death... Parents may be free to become martyrs themselves. But it does not follow they are free, in identical circumstances, to make martyrs of their children before they have reached the age of full and legal discretion when they can make that choice for themselves."[85] The court noted that the transfusions were "urgently needed," "virtually certain of success if given in time," and involved "only such attendant risk as is inescapable in all of the affairs of life."[86]

The Michigan Child Protection Law contains the following statement:

> Sec. 14. A parent or guardian legitimately practicing his religious beliefs who thereby does not provide specified medical treatment for a child for that reason alone shall not be considered a negligent parent or guardian. This section shall not preclude a court form ordering the provision of medical services or nonmedical remedial services recognized by state law to a child where the child's health requires it nor does it abrogate responsibility of a person required to report child abuse or neglect.[87]

---

83. Id. at 772

84. *Prince v. Massachusetts*, 321 U.S. 158, 167, 64 S.Ct. 438, 88 L.Ed. 645, cited at 104 N.E.2d at 773-774

85. *Wallace* at 774

86. Id at 773

87. MCL 722.634

This section seems consistent with *Wallace* in that it recognizes a parent's freedom of religion while also recognizing the limitations on religious practices where they seriously threaten the life and health of a child too young to make that choice for himself. **This section of the statute reaffirms the power of the court to order medical care for a child under existing state law even where parents may be motivated by sincere religious beliefs.** The Colorado Supreme Court, interpreting a state statute very similar to MCL 722.634, found that where a minor suffers from a life-threatening medical condition due to the parents' failure to comply with a program of medical treatment on religious grounds, the statute does not bar a finding of neglect nor does the statute violate constitutional provisions protecting free exercise of religion.[88]

3.5. WHEN MORE THAN ONE COURT COULD BE INVOLVED

3.5.1. *One Family, One Judge*

The development of the Family Division makes it far easier to consolidate actions involving members of the same family before the same judge. The statute requires that whenever practicable matters within the Family Division's jurisdiction pending in the same judicial circuit and involving members of the same family must be assigned to the judge who was asigned the first matter.[89]

3.5.2. *Child Protection Jurisdiction Not Conferred Merely by Waiver.*

A waiver from one court does not automatically confer child protection jurisdiction on the Family Division. MCL 712A.2(c) allows the family division to accept waivers from another court but the family division still must comply with the requirements of the juvenile code before assuming jurisdiction.[90] The Supreme Court, in *Krajewski*, held:

> Waiver by a circuit court confers no jurisdiction on the probate court. The statute confers the jurisdiction.[91]

3.5.3. *Concurrent Jurisdiction; Notice*

The juvenile code provides that if a family court is faced with a neglect petition concerning a child who is subject to a prior or continuing order of another court

---

88. *People in the Interest of D.L.E.*, 645 P2d 271 (1982)

89 MCL 600.1-23(1); See also MCL 712A.2(c) allowing waiver of jurisdiction in divorce and child custody matters.

90. *In re Robey*, 136 Mich App 566 579 (1984)

91. *Krajewski v Krajewski*, 420 Mich 729 (1984)

of Michigan, the manner of notice to the other court and the authority of the probate court to proceed shall be governed by rule of the supreme court.[92]

MCR 5.927 says that MCR 3.205 governs proceedings involving a child who is subject to a prior order of another Michigan court. MCR 3.205(A) states that if proceedings are commenced in another court having separate jurisdictional grounds, a waiver or transfer of jurisdiction is not required for a full and valid exercise of jurisdiction by the subsequent court. Subsection (A)(2) requires notice to be sent by the subsequent court to the court with continuing jurisdiction 21 days before the hearing in the subsequent court. However, this notice requirement is not jurisdictional and does not preclude the subsequent court from entering interim orders before expiration of the 21 day period if the best interests of the child so require.[93] Note that the prior orders of the court with continuing jurisdiction remain in full force and effect until superseded, changed or terminated by a subsequent court order.[94] The subsequent court is admonished to give due deference to the prior court's orders but nonetheless has power to enter contrary orders or inconsistent orders in the best interests of the child.[68]

Failure to notify a prior court did not divest the juvenile court of its statutory jurisdiction. In *DaBaja*[68] the court of appeals affirmed a termination of parental rights and stepparent adoption despite the fact that the notice had not been given to the circuit court with continuing jurisdiction over the child as a result of divorce. The termination order was inconsistent with a prior order of the circuit court. The court held that the probate court had concurrent jurisdiction over the child by statute, rendering a waiver or transfer of jurisdiction by the circuit court unnecessary. Failure to notify the circuit court did not divest the probate court of its statutory jurisdiction. The probate court may enter orders inconsistent with those of the circuit court "as the welfare of the child and the interests of justice require.[97] One highly respected commentator writes: "*DaBaja* makes it clear that the circuit court, with continuing concurrent jurisdiction over a child of divorce, has no ability to prevent a stepparent adoption if the statutory grounds are proven in probate court."[98]

---

92. MCL 712A.2(b)

93. MCR 3.205(A)(2)

94. . MCR 3.206(C

95. MCR 3.206(C)(2)

96. *In re DaBaja*, 191 Mich App 281, lv to app den. 439 Mich 922 (1992)

97. Id. at 285

98. Scott G. Bassett, *Family Law*, 39 **Wayne Law Review** 741, 795 (1993), the annual survey of Michigan Law.

3.5.4. *Transfer of Jurisdiction to County of Residence*

Jurisdiction over a child rests with the family court in which the child is found, but may be transferred to the child's county of residence.

> If any juvenile is brought before the court in a county other than that in which the juvenile resides, the court may enter an order transferring the jurisdiction of the matter to the court of the county of residence. Consent to transfer jurisdiction is not required if the county of residence is a county juvenile agency and satisfactory proof of residence is furnished to the court of the county of residence. The order is not a legal settlement as defined in section 55 of the social welfare act, 1939 PA 280, MCL 400.55. The order and a certified copy of the proceedings in the transferring court shall be delivered to the court of the county of residence.*** [99]

The court rules provide that when a child is brought before a family court in a county other than where the child resides, that court may transfer the case to the court in the county of residence prior to trial.[100] Costs associated with a child's care are assigned to the court which orders the disposition if other than the county of residence unless:

> (1) the court in the county where the minor resides agrees to pay the costs of such disposition, or
>
> (2) the minor is made a state ward pursuant to the youth rehabilitation services act, 1974 PA 150, MCL 803.301 et seq. and the county of residence withholds consent to a transfer of the case.[101]

3.5.5. Venue

Venue is proper in child protective proceedings in the county where the child is found.[102] The venue of proceedings in family court may be changed if:

1) for the convenience of the parties and witnesses, provided that a judge of the other court agrees to hear the case; or
2) when an impartial jury cannot be had where the case is pending.[103]

---

[99]. MCL 712A.2(d)
[100] MCR 5.926(B)
[101] MCR 5.926(C)
[102] MCL 712A.2(b)
[103]. MCR 5.926(D)

All costs of the proceeding in another county are to be borne by the family court ordering the change of venue.[104]

3.5.6. Children from Another State

The Uniform Child Custody Jurisdiction Act gives a Michigan court jurisdiction of custody proceedings, including child protection cases, when the child is physically present in the state and has been abandoned or action is required in an emergency to protect the child.[105] Before hearing the petition in a custody case, however, the Michigan court must determine if a court of another state is exercising jurisdiction in a custody proceeding, including a child protection proceeding.[106] If another state is exercising jurisdiction or is the home state of the child involved, the Michigan court cannot proceed, except for emergency actions, unless the court of the other state stays its proceeding because Michigan is the more appopriate forum for other reasons.[107]

---

104 *Id*.

105 MCL 600.651 et. seq.

106 MCL 600.656(2)

107 MCL 600.656(1)